Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 79-293

JERRY YONO,
Petitioner,
v.
COLUMBUS LANDINGS, LTD.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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The Petitioner, JERRY YONO, respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above case July 23, 1979.

OPINION BELOW

The opinion of the Court of Appeals of July, 1979 is set forth in Appendix "A".

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered July 23, 1979. This petition was filed within the thirty (30) day time period specified by the rules of the Supreme Court. The jurisdiction of this Court is invoked under 18 U.S.C. 1254(1).

QUESTIONS PRESENTED

I

WHETHER THE DISTRICT COURT ERRED BY FINDING THAT THE TERM "ALL ROADS" USED IN THE ADDENDUM TO THE CONTRACT IS EQUIVOCAL AND AMBIGUOUS AND CONSEQUENTLY ERRED BY IGNORING THE PLAIN MEANING OF THE WORDS AND RESORTING TO RULES OF CONSTRUCTION AND INTERPRETATION TO GIVE THE WORDS A DIFFERENT MEANING.

II

WHETHER THE DISTRICT COURT ERRED BY FINDING THAT EVEN IF THE TERM "ALL ROADS" MEANT ALL THE ROADS IN THE SUBDIVISION AND NOT JUST THE ACCESS ROAD, THE DEFENDANT-RESPONDENT DID NOT MATERIALLY BREACH THE CONTRACT BY FAILING TO CONSTRUCT THE ROADS WITHIN THE THREE (3) YEAR TIME PERIOD SPECIFIED IN THE ADDENDUM TO THE CONTRACT.

III

WHETHER THE DISTRICT COURT ERRED BY FINDING THAT THE STATEMENTS MADE BY RESPONDENT'S AGENTS TO PLAINTIFF-PETITIONER IN ORDER TO INDUCE HIM TO ENTER THE CONTRACT WERE MERE "OPINIONS" OR "PUFFING" AND NOT FALSE STATEMENTS KNOWINGLY MADE REGARDING MATERIAL FACTS ABOUT THE DEVELOPMENT OF THE ISLAND, THE CONSTRUCTION OF ROADS, AND THE VALUE OF THE PROPERTY.

STATEMENT OF THE CASE

The Plaintiff, JERRY YONO, sought rescission of the contract to purchase land on the Island of San Salvador on the grounds that the Defendant had materially breached a substantial term of the contract and because Plaintiff, in entering into the contract, has relied on materially false representations made by Defendant's agents concerning this property.

On May 17, 1977, following a trial before the Honorable Fred W. Kaess, District Judge, United States District Court, Eastern District of Michigan, the Court entered a Judgment for no cause of action and entered an Order granting Defendant attorney fees and costs. On July 23, 1979 in a per curiam opinion, the Court of Appeals for the Sixth Circuit affirmed.

At trial, the evidence showed that in the early part of 1970 the Plaintiff, JERRY YONO, met with John Wilt, who said he was an agent for Investment Corporation of Florida (ICOF), to discuss Plaintiff's possible investment in land on the Island of San Salvador in the Bahamas. At that time Wilt represented that the Island

was one of the best in the Bahamas and that investors would get their money back with big profits within one (1) year (Tr, 6-8).

In April or May, 1970, Plaintiff met with Mr. Wilt and Sherwood Faubel in Detroit. Faubel said that he was one of the head men of the Bahamian Columbus Landings Project, of which ICOF was said to be the owner and developer (Tr, 11). At that meeting Wilt and Faubel represented to Plaintiff that "all roads" on the Island would be built within three (3) years, that the Island would be developed within one (1) or two (2) years, and that after that time the property would be worth a great deal more than was paid for it (Tr, 14).

MR. YONO, as a Trustee of the YONO Estate, was interested in a hotel site on the Island. No hotel sites were available at that time, but MR. WILT stated that hotel sites would be available in other Subdivisions at a future date (Tr, 16). It was agreed that MR. YONO would purchase land in COLUMBUS LANDINGS I, which had no value as a hotel site and that he would have priority in a hotel site in another Subdivision, either COLUMBUS LANDINGS II, III or IV (Tr, 17). The Plaintiff was not givent the exact location of the lots he would eventually own (Tr, 54) because at the time the Defendant did not know when or where a hotel site would become available.

On May 29, 1970, JERRY YONO signed a Purchase Agreement. The Purchase Agreement provided for the purchase of four (4) or five (5) pieces of property for One Hundred Thousand ($100,000.00) Dollars from COLUMBUS LANDINGS LIMITED, a subsidiary of ICOF (Tr, 20). At this time, MR. YONO paid Ten Thousand ($10,000.00) Dollars down and was to pay the

rest in monthly payments. Paragraph Eight (8) of this Agreement provided that:

> The seller agrees to construct water bonded, graded rock roads *throughout the Columbus Landings Subdivision shown on the plat* and further guarantees that each lot covered by this Agreement will have full frontage on such a road, accessible by automobile, *before the expiration of the contract maturity period.* (emphasis added) (Exhibit #1)

MR. YONO insisted that an Addendum to the Agreement be executed, putting in writing the oral promise made by Wilt and Faubel (Tr, 26). On May 29, 1970, an Addendum to the Purchase Agreement was entered into, which in Paragraph One (1) provided as follows:

> "It is fully understood by the buyer that all roads must be completed with a maximum time limit of three (3) years." (Exhibit 2)

On August 25, 1970, an Amendment to the Purchase Agreement and the Addendum was entered into whereby the project description was changed from *Subdivision I to Subdivision III* (Tr, 26).

Prior to May 29, 1970, MR. YONO, travelled to the Island on several occasions (Tr, 50). At that time there was already a road built circling the entire Island (Tr, 52 and 56). From May, 1970 to July or August, 1974, JERRY YONO made timely payments of approximately Sixty-Nine Thousand Two Hundred Fifty ($69,250.00) Dollars (Tr, 33). The Plaintiff stopped the payments in July or August, 1974 because all the roads in Subdivision III and other Subdivisions had not been

built, he felt he could only get to his property by boat, he felt he did not have adequate access to all parts of his property, and because he saw little construction in Subdivision III and minimal development or construction on the Island as a whole (Tr, 36). This decision to stop payments was also based on an August 27, 1974 letter from COLUMBUS LANDINGS LIMITED stating, among other things, that COLUMBUS LANDINGS had just contracted for the construction of roads in Subdivision II, III and IV (Tr, 38-39). In August, 1974, MR. YONO spoke to MR. FAUBEL and expressed dissatisfaction because the promised roads had not been constructed and the Island was not being developed. At the same time, the Plaintiff demanded his money back because he felt that COLUMBUS LANDINGS had not kept its part of the bargain (Tr, 40). On November 7, 1974, MR. YONO received a letter from COLUMBUS LANDINGS indicating again that temporary financing had permitted them to begin completion of the roads in Subdivisions II, III and IV (Tr, 41-42). In July, 1976, MR. YONO made his last trip to the Island and still saw little improvement on the Island or Subdivision III, although he did observe that two (2) individuals were building homes elsewhere on the Island and that six (6) condominiums had been built on another part of the Island (Tr, 45).

At trial, the defense did not present either MR. FAUBEL or MR. WILT, who has not been seen for four (4) or five (5) years (Tr, 72), and other than JAMES NALL the defense produced no witnesses. According to Mr. Nall, Plaintiff's property in Subdivision III was bordered by the ocean and by part of the road that circled the Island. The stretch of this road that touched the Plaintiff's lots was labeled Discovery Bay Boulevard

(Tr, 88). Mr. Nall stated that the Inn on the Island had been remodeled (Tr, 89), but admitted that no hotels had been built (Tr, 98). Six (6) condominiums were said to have been built by COLUMBUS LANDINGS since 1973 (Tr, 90) but MR. NALL conceded that none had been built prior to 1973 (Tr, 97). He also agreed that most of that which had been done on the Island had taken place after January, 1975. This slack period was described as being due to the fact that in 1973 COLUMBUS LANDINGS had intentionally shut down its sales operation because of the fuel crisis and the collapsing real estate market. The Plat for Subdivision III, as well as that for the other Subdivisions, called for roads but MR. NALL was not familiar with the roads that had been scheduled to be built in Subdivisions according to the Plat drawn up in May, 1970 (Tr, 99-100), and he did not know which of those roads had been completed by May, 1973.

ARGUMENT

I

THE DISTRICT COURT ERRED BY FINDING THAT THE TERM "ALL ROADS" USED IN THE ADDENDUM TO THE CONTRACT IS EQUIVOCAL AND AMBIGUOUS AND CONSEQUENTLY ERRED BY IGNORING THE PLAIN MEANING OF THE WORDS AND RESORTING TO RULES OF CONSTRUCTION AND INTERPRETATION TO GIVE THE WORDS A DIFFERENT MEANING.

Paragraph eight (8) of the Purchase Agreement entered into between Plaintiff and Defendant on May 29, 1970, provides:

> "The seller agrees to construct water bonded, graded rock roads *throughout the Columbus Landings Subdivision shown on the plat* and further

> guarantees that each lot covered by this Agreement will have full frontage on such a road, accessible by automobile, *before the expiration of the contract maturity period.*" (emphasis added)

The Addendum to the contract entered May 29, 1970 provides:

> "It is fully understood by the buyer that all roads must be completed within a maximum time of three (3) years."

The Defendant stipulated at trial that this Addendum applied to each of the changes made in the legal description of Plaintiff's property, including the lots in the final transfer to Subdivision III (Tr, 15).

The Plaintiff's position at trial was that by agreeing to the Addendum the Defendant had agreed to construct *all roads* in all of the four (4) Subdivisions within three (3) years of May 29, 1970, and that the failure to do so was a breach of a substantial term of the contract that demanded rescission. The Court rejected this argument and held that the parties had understood "all roads" to mean *all access roads* to all four (4) Subdivisions. Plaintiff contends that this interpretation or construction of the contract was unsupported by the evidence and was the result of an erroneous application of the law of Michigan.

It is well established that rules of construction are resorted to only where the language of the contract is ambiguous and susceptible of different meanings. *Berk* v. *Gordon Johnson Company*, 232 F. Supp. 682, 687 (E.D. Mich. S.D. 1964). If the terms of a contract are not ambiguous, the terms control and any intent of the

parties differing from those terms cannot be read into the contract. *Dunn* v. *Detroit Federation of Musicians*, 268 Mich. 698 (1934). The Courts do not write contracts for the parties nor do they read into an unambiguous contract words or provisions it does not contain. *Florida Canada Corp.* v. *Union Carbide & Carbon Corp.*, 280 F2d 193, 196 (6th Cir. 1960).

There can be little doubt that "all roads" by itself is unambiguous and not subject to differing meanings. Neither is an ambiguity created by the fact that Paragraph Eight (8) of the Purchase Agreement refers to ". . . the Subdivision . . . shown on the plat . . ." while the Addendum does not. Where separate documents were executed at the same time by the same parties, refer to one another, and relate to the same matter, the separate instruments are construed together as the Agreement of the parties. *West Madison Inv. Co.* v. *Fileccia*, 58 Mich. App. 100, 106 (1975); *C. J. Rogers, Inc.* v. *Highway Dept.*, 36 Mich. App. 620 (1971).

When the Purchase Agreement and the Addendum are read together as a whole to determine the agreement between the parties, "all roads" does not become subject to any unique or different meanings. On May 29, 1970, the Plaintiff knew his property would be located in either Subdivision II, III or IV. His insistence on the Addendum was to ensure that the Island and his property would be developed as promised and the Addendum clearly provided that *all roads* would be constructed within three (3) years without limiting that language to any particular Subdivision or road. Under these circumstances, it was unreasonable and erroneous for the Court to conclude that "all roads" could have more than one meaning and that at the time of the

contract the parties only intended that language to apply to the one road granting access to the four (4) Subdivisions. This finding is particularly erroneous where the Plaintiff testified to the contrary and where the Defendant did not present any evidence on that issue. The defense did not produce either MR. FAUBEL or MR. WILT, the two (2) men who negotiated with MR. YONO for the Defendant. The only witness for the Defendant was MR. NALL, a corporate officer who played no role in negotiating either the Purchase Agreement or the Addendum and who was not even familiar with the roads planned for the Subdivisions or the Island. The Defendant at no time, either in the Answer, Amended Answer or during trial, contended that "all roads" only meant the access to Plaintiff's property, and presented no evidence to support that position.

Paragraph Eight (8) of the Purchase Agreement referred to roads in ". . . the . . . Subdivision . . . shown on the plat . . ." while the Addendum related to "all roads" without mentioning any particular Subdivision. It was never satisfactorily established at trial which Subdivision or plat the above paragraph was referring to. When MR. YONO went to the Island prior to signing the contract, the Defendant had shown him a diagram, map or plan of the entire Island, which included the streets of all four (4) Subdivisions. Since the parties knew Plaintiff's land would not be in Subdivision I, it would have been unlikely that they would have intended "all roads" to cover only Subdivision I, even if that was the Plat originally referred to in the Purchase Agreement. No ambiguity should be found in this regard in that it is more sensible to conclude that the Addendum was intended

to relate to all roads in all Subdivisions. This is particularly true since the Defendant stipulated at trial that the Addendum applied to both property transfers made.

The finding that the parties understood "all roads" to mean all access roads was a strained interpretation that gave the words something other than their usual and ordinary meaning, was unsupported by any evidence and was the result of the Court's reading into an unambiguous contract words it did not contain. In effect, the Court drafted a new contract for the parties. Nowhere in its Opinion did the Court describe the evidence it had relied on to interpret "all roads", and the interpretation reached was not supported by the evidence brought out at trial.

When MR. YONO first visited the Island prior to May 29, 1970, there was one road circling the Island. According to the master plan for the entire Island, which MR. YONO was shown at this time, this one road was intended to provide access to all four (4) Subdivisions. According to Judge Kaess, it was this single road that the parties intended the Addendum to cover, but such an understanding is extremely unlikely considering the circumstances existing at the time. On May 29, 1970, the Plaintiff and the Defendant knew that this one road would circle the Island and provide access to the four (4) Subdivisions. This being so, the ruling that the parties intended "all roads" to mean all access roads is even more difficult to comprehend. Rather than numerous access roads there was only a single road circling the Island. If the parties had intended the Addendum to cover only the single road around the Island, "all roads," a plural, would not have been the

appropriate language. Further, as the single road was there when the Plaintiff first visited the Island prior to signing the contract, it is unlikely that he intended the Addendum to relate only to a road that was already in existence.

For these reasons, Plaintiff contends that "all roads" is unambiguous and was shown by a preponderance of the evidence to refer to all of the roads in the four (4) Subdivisions, rather than to the one access road. Unambiguous language in a contract must be held to express the intention of the parties. *Ginsberg* v. *Linen Service Co.*, 292 Mich. 70 (1940).

In *Ginsberg, supra*, a contract providing that the salary of employees would not abate because of illness or disability was held to mean exactly that. The contract did not state that only brief or casual illness were covered, and the Michigan Supreme Court held that the clear and unambiguous terms of the contract could not be read otherwise. Like the contract language in *Ginsberg, supra, "all roads"* is clear, unequivocal and unambiguous, and should have been given its common and ordinary meaning. It was error for the trial court to avoid this plain language by finding a contrary intention by the parties. Unambiguous language must be held to express the intention of the parties, *Ginsberg supra*, and in such a situation it is error to resort to rules of construction and interpretation. *Berk, supra*.

In construing any contract, the words used should be given their ordinary meaning unless good reason is shown why this should not be done. *American States Insurance Co.* v. *Stachowski*, 249 F. Supp. 189, 193 (E.D. Mich. S.D. 1965). In *Stachowski*, an insurance policy stated that "all operations" of the Defendant's

construction business were covered, but then went on to list thirty-eight (38) exclusions which the insurance company claimed limited coverage. The insured was seeking compensation for the damage caused by the escape of large quantities of liquids he had stored on his property on the basis that since it was part of his business it fell within the "all operations" language of the contract. The Court held at 193 that words should normally be given their ordinary meaning and said that under this general rule "all operations" would mean exactly that. Under this rule of law, there would be no limitations on liability. However, since the activity involved, storing large quantities of liquids, was not a normal activity for Defendant's business, and as it had traditionally been regarded as an ultra-hazardous activity, the Court held the risk to be so great that coverage under a standard insurance policy would not have been intended. In other words, there was good reason for not giving the words their ordinary meaning.

Under the facts of the instant case, unlike those in *Stachowski, supra*, the failure to give "all roads" its plain and literal meaning was unjustified. There was no good reason for holding that "all roads" meant all access roads when that interpretation was contrary to their plain meaning. The Plaintiff had seen the Defendant's master plan for the entire project, including all four (4) Subdivisions. At the time of the Addendum, the parties were aware of these detailed plans for future development and it was not as if Subdivisions II, III and IV were completely unorganized dreams of the future. When the plans for Subdivisions II, III and IV were in existence and when the Defendant's agents

stated that the entire Island would be developed within a few years, it is not at all unlikely that the parties understood "all roads" to have their literal meaning.

II

THE DISTRICT COURT ERRED BY FINDING THAT EVEN IF THE TERM "ALL ROADS" MEANT ALL THE ROADS IN THE SUBDIVISION AND NOT JUST THE ACCESS ROAD, THE DEFENDANT-RESPONDENT DID NOT MATERIALLY BREACH THE CONTRACT BY FAILING TO CONSTRUCT THE ROADS WITHIN THE THREE (3) YEAR PERIOD SPECIFIED IN THE ADDENDUM TO THE CONTRACT.

Michigan Courts have permitted rescission as a remedy for a material breach of contract. *Rosenthal* v. *Triangle Development Co.*, 261 Mich 462 (1933). But the District Court held that assuming Plaintiff's interpretation of "all roads" to be correct, Defendant's failure to construct all the roads in Subdivisions II, III and IV within three (3) years of May 29, 1970, was not a material breach, citing *Walker and Co.* v. *Harrison*, 347 Mich 630, 635 (1957).

However, Section 266 of the *Restatement 2d, Contracts* (Tentative Draft, 1973), provides:

> In determining whether a failure to perform or to make an offer to perform is material, the following circumstances are significant:
>
> (a) The extent to which the injured party will be deprived of the benefit which he reasonably expected;

> (b) The extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) The extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) The extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

See also *Restatement of Contracts*, Section 275.

In the instant case, JERRY YONO and COLUMBUS LANDINGS agreed that all roads in all Subdivisions would be built within three (3) years. While the Plaintiff did receive a hotel site, the only road completed on the Island or in Subdivision III within the three (3) year period was the one road circling the Island which granted access to Plaintiff's property. A single road around an Island cannot be said to provide the same benefit the Plaintiff anticipated, that is, roads constructed throughout all the Subdivisions.

MR. YONO had insisted on the Addendum under the belief that the construction of these roads would ensure the promised development of the Island. In fact, neither the promised road construction or Island development have yet occurred. Under these circumstances it is almost impossible to place Plaintiff in the position he

would have been in in 1973 had the contract not been breached. The difference between the actual value of the Plaintiff's property in 1973 and its value if all the roads had been built is impossible to ascertain and would be mere speculation. The extent to which the construction of the roads and the development of the Island would have increased the value of the hotel site cannot be determined.

MR. YONO demanded that the contract be rescinded and his money returned in August, 1974, and the Court should have examined the circumstances then, not those existing in May, 1977, when determining whether the breach was material. It is the extent to which the defendant had performed in May, 1973 or August, 1974 that is pertinent. In August, 1974, very little had been done on the Island and almost nothing had been done on Subdivison III. The Inn referred to by the Court had been on the Island since 1970. Other than six (6) condominiums that had been built on the Island, most if not all of the improvements mentioned by the Court were made after January, 1975, and most, if not all, were on parts of the Island other than Subdivision III. This lack of development was a result of the Defendant's intentional efforts to halt land sales and construction. Regardless of whether this failure of performance was due to the fuel crisis or a real estate crash, it cannot be labeled an exercise of good faith or fair dealing when the Defendant, through its agents, had led the Plaintiff to believe that all the roads would be built, and the entire Island developed within three (3) years.

The Michigan case that is most on point, and which the Trial Court failed to consider, is *Brow* v. *Gilbralter Land Co.*, 249 Mich 662 (1930). There, *Brow* brought

suit to recover money he had paid as part of the contract price of a lot. The lot was part of a Subdivision in which the Defendant had agreed to make certain improvements such as roads, canals and bridges. The Defendant had been enjoined from making the improvements in question, and little had been done to complete any of the improvements. The Plaintiff testified that the land had been purchased for boat storage and that he was unble to do so without the canals, streets and bridges provided for in the contract. Plaintiff's theory was that since the improvements were not completed within a reasonable time he had the right to rescind and to recover the sums paid. The Michigan Supreme Court agreed. The Defendant's failure to construct the improvements within a reasonable time was held to be a breach of contract that justified rescission.

Except for the fact that the improvements here were to have been completed within a specific time period, the instant case is very similar to *Brow, supra.* COLUMBUS LANDINGS contracted to build all roads in all Subdivisions but did not do so. By August, 1974, instead of having a valuable hotel site in a Subdivision with residential roads on an Island composed of four (4) Subdivisions with residential roads, the Plaintiff found himself the owner of a lot of an undeveloped Island with one access road. The lack of roads through each Subdivision denied the Plaintiff the advantage of owning a hotel site on an Island consisting of four (4) developed Subdivisions as he had been promised. In *Brow, supra*, the land could not be used as a purchaser had intended, and here the failure to make improvements deprived the Plaintiff of the environment he had anticipated.

For the above reasons, the failure to build all roads in all Subdivisions with three (3) years was a material breach of contract justifying rescission according to *Brow* v *Gilbralter Land Co., supra*, §275 of the *Restatement* and §266 of the *Restatement, 2d* and the District Court and Court of Appeals clearly erred in ruling otherwise.

III

THE DISTRICT COURT ERRED BY FINDING THAT THE STATEMENTS MADE BY DEFENDANT-RESPONDENT'S AGENTS TO PLAINTIFF-PETITIONER IN ORDER TO INDUCE HIM TO ENTER THE CONTRACT WERE MERE "OPINION" OR "PUFFING" AND NOT FALSE STATEMENTS KNOWINGLY MADE REGARDING MATERIAL FACTS ABOUT THE ISLAND DEVELOPMENT, THE CONSTRUCTION OF ROADS, AND THE VALUE OF PLAINTIFF'S PROPERTY.

Rescission of a contract can be based on unconscionable conduct, fraud or material misrepresentations. *O'Connor* v *Bamm*, 335 Mich. 438, 443 (1953). Proof of fraud or material misrepresentations consists of a showing:

> (1) that defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury.
>
> *Head* v *Benjamin Rich Realty Co.*, 55 Mich App. 348, 358 (1974).

The evidence adduced at trial, which was never contradicted or denied by COLUMBUS LANDINGS, was that prior to and during the signing of the contract the agents of the Defendant, MR. WILT and MR. FAUBEL, repeatedly told MR. YONO: The Island would be the best in the Bahamas and within one year the Plaintiff would get his money back with a big profit (Tr, 8), that the Island would be developed within a year or two, that the Island would be a gold mine within a year or two, the hotel property would sell for "a heck of a lot more" than the Plaintiff paid for it (Tr, 15), that it was a terrific investment and would be developed within a couple of years and that the buyer could make a large profit on it, could sell it for a bigger price and there would not be any problem with COLUMBUS LANDINGS selling it (Tr, 23). MR. FAUBEL clearly stated that all roads on the land owned by COLUMBUS LANDINGS would be completed "way before" three (3) years time (Tr. 24). MR. YONO was interested in all four (4) Subdivisions as well as the roads in those Subdivisions and that is why he insisted on the Addendum. At trial, MR. YONO stated that if he had known in May, 1970 that all roads would not have been completed within three (3) years he would not have entered into the Agreement (Tr, 46-47).

Where misrepresentations are made by an agent the principals can be held liable, *Head, supra*, and MR. WILT and MR. FAUBEL were acting as Defendant's agents. Plaintiff contends that the actions of the Defendant's agents fall within the above description and that as a result he is entitled to rescission.

The court treated the Defendant's promises regarding the value of the property as being entirely separate from the other alleged misrepresentations and held they were mere "puffing" on the part of the seller that were expressions of opinion that could not be taken seriously. As authority, the Court cited *Hayes Construction Co.* v *Silverthorn*, 343 Mich 421, 426 (1955). While *Silverthorn, supra*, does stand for this position, the facts of that case are distinguishable from those in the case at bar. In Silverthorn, an experienced builder had ordered furnaces for a project based upon representations made about their quality. The Court declined to consider whether these representations were fraudulent because they were seen as expressing only the opinion of the seller. However, the Court recognized that this principle does not mean that all such misrepresentations are not actionable.

> One party may have special knowledge and the other none and without the means of getting it. In this case, the latter cannot fairly and reasonably exercise his own judgment. The parties, therefore, do not stand on equal terms and the buyer has right to rely upon the representations of excellence made by the seller. *Silverthorn, supra*, at 426-427.

The instant case falls within the above area of fraud and the trial court erred in finding otherwise. JERRY YONO had no special knowledge of the plans for the development of the Island or for the construction of the roads and he could only rely on the promises of MR. WILT and MR. FAUBEL. Visiting the Island prior to signing the contract could in no way expand MR. YONO'S ability to measure the accuracy

of the representations that all roads would be built within three (3) years, the entire Island would be completely developed within a few years, and that this would greatly increase the value of his property.

When considered in this light, the representation that the hotel property would greatly increase in value within a few years must be regarded not as an opinion, but rather as a statement of fact. Representations of value can be statements of fact, rather than expressions of opinion, under circumstances where the seller has particular knowledge of the property and the purchaser was without such knowledge. *Sutton* v *Benjamin*, 231 Mich 153 (1925). Here, MR. WILT and MR. FAUBEL, men who presented themselves as agents, employees or officers of COLUMBUS LANDINGS, stated that the property owned on San Salvador would be developed within two (2) or three (3) years of 1970, and that as a result the Plaintiff's property in this completed project would be greatly more valuable within this short period of time. These were statements of material fact which Plaintiff had a right to presume were within the knowledge of the Defendant's agents, employees or officers, and of which they knew MR. YONO had no knowledge. See, *Kefuss* v *Whitley*, 220 Mich 67 (1922) where a real estate owner's statements concerning the value of the property Plaintiff was investing in and the profits he could expect to earn were held to be statements of fact the Plaintiff could rely on and which justified rescission because of their inaccuracy.

While actionable fraud may not be predicated on erroneous predictions as to future conduct:

> The speaker cannot escape liability on the plea that his statements related to the future if he

> misrepresented hopes as facts, contingencies as existing conditions, or contemplated arrangements as arrangements already agreed on. *Kefuss* v *Whitley, supra*, at 83.

This is exactly what the Defendant did through its agents. The completion of all roads and the development of the entire Island within two (2) or three (3) years were not presented as speculation or hopes, but as conditions or facts. JERRY YONO purchased the property in question because of the representations that within a relatively short period of time, two (2) or three (3) years, he would own a hotel site on a completely developed Island. Under these circumstances, the Plaintiff's hotel site would almost certainly increase in value, and the Plaintiff had no reason for concluding that the representations made to him were false and not based on special knowledge.

Accordingly, rescission of the contract is proper and the Trial Court ignored the great weight of the evidence in holding otherwise.

CONCLUSION-RELIEF REQUESTED

For the above reasons, Petitioner, JERRY YONO, contends that "all roads" was intended to mean, and did mean, all roads in all Subdivisions, and that COLUMBUS LANDINGS' failure to complete the roads within three (3) years was a breach of contract. The breach was material and justified rescission because it deprived the Plaintiff of the benefits he had reasonably anticipated; that is, a hotel site on an Island that within three (3) years would be composed of developed Subdivisions. Further, the contract should be rescinded

for the reason that the Plaintiff was enticed into the contract by knowingly false representations of fact made by the Defendant's agents that were not within the Plaintiff's knowledge, to wit: that the Island would be fully developed with a few years, the roads would all be built within three (3) years, and that as a result the Plaintiff's property would greatly increase in value within this short period of time.

For the foregoing reasons, Petitioner, JERRY YONO, respectfully prays that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Sixth Circuit in this case.

Respectfully Submitted,

BELL AND HUDSON, P.C.

By: EDWARD F. BELL P10652
Attorneys for Petitioner

Dated: August 17, 1979

APPENDIX A

OPINION

(United States Court of Appeals for the Sixth Circuit)

(Decided and Filed July 23, 1979.)

(JERRY YONO, Plaintiff-Appellant, v. COLUMBUS LANDINGS, LTD. Defendant-Appellee. No 77-1441)

Before: WEICK, CELEBREZZE, and KEITH, Circuit Judges.

The Court delivered a per curiam opinion. KEITH, Circuit Judge, (p. 3) delivered a dissenting opinion.

PER CURIAM. Yono's suit in the District Court was for rescission of a written contract entered into by him on May 29, 1970, with Columbus Landings, Limited, (Columbus) a development corporation, for the purchase of vacant lots on the Island of San Salvador, Bahamas. Yono purchased the land for investment purposes. He wanted a site on which a hotel could be erected. The site he purchased could not be used for any such purpose but it was agreed that it could be exchanged for such a site when it became available in the planning of three more subdivisions on the island.

The contract provided that Columbus would build access roads to each lot covered by the contract prior to the expiration of the contract maturity date which was eight years. Yono insisted the roads be built within three years and an addendum was entered into providing therefor.

A year later an agreement was entered into transferring Yono's land in Columbus Landings No. 1 to the promised hotel site in Columbus Landings No. 3

which was bounded on two sides by the ocean. For several years thereafter Yono continued to make payments on the contract. The access road to Yono's lots was completed in March 1972. In August 1974 Yono ceased payment on the property and demanded return of the money he had paid. He claimed that Columbus had not built roads on all of the subdivisions on the island within three years and that representations made by the agents of Columbus were materially false and knowingly fraudulent. He filed suit for rescission in the District Court. Jurisdiction was based on diversity of citizenship.

The District Judge, sitting at a bench trial, interpreted the contract. He held that there was no breach of contract by Columbus since "all roads" meant all access roads and the one access road on the island had been timely built. He also found that the contract had been materially and substantially performed by Columbus. He also found that Columbus had made no fraudulent representations; that opinions given as to the value of the land made by agents of Columbus were mere "puffing' and were not actionable.

The District Judge applied Michigan law which conforms to the criteria set forth in Restatement of the Law of Contracts (1933) to determine whether a breach is material. *Walker & Co.* v. *Harrison*, 347 Mich. 630; 81 N.W. 2d 352 (1957). Thus, even if there was a breach, the court found it was not material.

We are of the opinion that the findings of fact of the District Court are supported by substantial evidence and are not clearly erroneous. Its conclusions of law are correct.

We affirm the judgment of District Judge Kaess for the reasons herein stated and as amplified in his memorandum opinion. It is so ordered.

KEITH, Circuit Judge, dissenting.

Mr. Yono, the plaintiff, ended up with a block of land in subdivision III of the defendant's real estate development on the island of San Salvador. It is undisputed that he wished to build an hotel on his land and that he insisted on a contractual term that "all roads must be completed within a maximum time limit of three years."

I think that "all roads" means what it says and should be given its plain meaning. Further, in light of evidence that there is only one "access" road around the island, which was in existence when the contract was signed, I see no basis for the district court's conclusion that "all roads" meant "all access roads."

Contrary to the district court, I further believe that this breach was material. The plaintiff was interested in investing in an hotel site and bought the land on that understanding. The defendant's failure to build all of the roads on time hampered development which would have increased the desirability and profitability of building an hotel. Given that plaintiff's investment was was [sic] made with the view to building an hotel and that the plaintiff specifically insisted that all roads be built within three years, I do not see how the breach could be anything but material.

I would reverse and remand with directions to grant recission [sic] of the contract.

Supreme Court, U. S.
FILED
SEP 10 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-293

JERRY YONO,
Petitioner,

v.

COLUMBUS LANDINGS, LTD.,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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OCTOBER TERM, 1979

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JERRY YONO,
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Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JUDGMENT AND ORDER GRANTING ATTORNEY FEES

(United States District Court
Eastern District of Michigan
Southern Division)

(JERRY YONO, Plaintiff vs COLUMBUS LANDINGS LIMITED, Defendant. Civil Action No. 75-71151)

At a sesssion of said Court, held in the Federal Building, in the City of Detroit, Wayne County, Michigan, this 17th day of May, A. D. 1977;

Present: THE HONORABLE FRED W. KAESS, United States District Judge.

Trial of this matter having been held before this Court on May 4, 1977, and a decision having been duly rendered in a Memorandum Opinion of even date herewith;

IT IS ORDERED and ADJUDGED that a Judgment for No Cause of Action be, and hereby is, entered in this case.

IT IS FURTHER ORDERED that defendant be, and hereby is, granted statutory attorney fees and costs.

/s/ Fred W. Kaess
United States District Judge

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

On or about May 29, 1970, plaintiff and defendant entered into a contract for the sale of certain property located on the Island of San Salvador in the Bahamas. Plaintiff seeks rescission of this contract, both on the ground of fraud and of material breach of contract. Jurisdiction is founded on diversity pursuant to 28 U.S.C. §1332. Trial of this matter was held on May 4, 1977. The following Opinion constitutes the findings of fact and conclusions of law as required by Rule 52, Federal Rules of Civil Procedure.

Finding of Facts

Sometime in May, 1970, Jerry Yono, as trustee for the Yono Trust, signed a purchase agreement with representatives of Columbus Landings Company, which is a sales subsidiary of Columbus Landings Limited, a subsidiary of Investment Corporation of Florida. The purchase agreement specified that the land which was the subject of the sale included lots 56, 21, and 42, of blocks 35 and 36, of Columbus Landings I on the Island of San Salvador. However, at the time the agreement was signed, all parties understood that Mr. Yono had no intention of retaining the lots recited in the purchase agreement. Rather, it was their understanding that Mr. Yono wished to purchase hotel land for investment purposes. Although hotel sites were in the planning stage for Columbus Landings subdivisions II, III, and IV, no hotel sites were available for purchase at that

time. Therefore, the parties agreed that the land "purchased" would be traded for comparably priced hotel sites in either Columbus Landings II, III, or IV when such became available.

Paragraph #8 of the purchase agreement states

> The seller agrees to construct water bonded, graded rock roads throughout the Columbus Landings Subdivision shown on the plat and further guarantees that each lot covered by this agreement will have full frontage on such a road, accessible by automobile, before the expiration of the contract maturity period.

An addendum to this contract, drafted by Mr. Yono's attorney, was executed on the same day. Paragraph #1 of the addendum reads in pertinent part

> It is fully understood by the buyer that all roads must be completed within a maximum time limit of three (3) years. It is further understood when this is completed, if and when buyer completes all payments on this contract, deed will be issued to buyer.

At the time the agreement was signed, the plat showed only Columbus Landings I, since Columbus Landings II, III, and IV were still in the planning stage.

In accordance with their mutual understanding, on August 25, 1970, the purchase agreement was changed from the description mentioned above to lots 54, 20, and 44, blocks 33 and 38, Columbus Landings I. At this time Mr. Yono was assured by representatives of Columbus Landings that they were reserving Lot 4 in Block 6 of Columbus Landings III as his ultimate hotel site, and that the land would again be transferred as

soon as possible. This was accomplished by an amendment to the purchase agreement dated July 8, 1971.

Plaintiff alleges that Defendant Columbus Landings breached its contract by not constructing the roads as required by the agreement and addendum. Plaintiff asserts that the failure to construct these roads was a material breach of the contract sufficient to warrant rescission.

Mr. Yono testified that each time he visited his property, it was either by boat or by air, and that he never was able to visit the property by land. He stated that when he visited the island with his family in January, 1973, he thought he remembered that he had asked someone at the Inn to take him to his property, but that person had declined, stating that since it had been raining for four days, the roads would not be safe. Mr. Yono also testified that the completion of the roads was significant to the contract because without the roads, you would not be able to get to the land.

By the terms of the original purchase agreement and addendum, the seller agreed to construct "water bonded, graded rock roads." Mr. James Noell, President of Investment Corporation of Florida, parent corporation of Columbus Landings Company, testified that water bonded, graded rock roads leading to the hotel site owned by Mr. Yono and shown on the current plat were constructed within three years as required by the purchase agreement and the addendum.

Since this statement was never contradicted by plaintiff, the Court accepts it as part of the finding of fact. However, plaintiff's attorney asserted that the phrases, "the seller agrees to construct . . . roads

throughout the Columbus Landings Subdivision shown on the plat" and "all roads must be completed by three years" was intended to mean that all roads within all four subdivisions were to be completed within three years. Plaintiff's attorney contends that this requirement was inserted in order to insure plaintiff that the nearby property would be sold and substantially developed so that plaintiff's hotel would be financially successful. However, plaintiff did not testify to this effect.

The Court finds this interpretation highly unlikely. The purchase agreement was a standard form to be used by seller and the purchaser of any property on the 2000-acre development. It is highly unlikely that a developer, at that time selling property only in a single subdivision, would intend to agree that the other three subdivisions still in the planning stage would have *all* roads completed within a three-year period. It is far more likely that both parties understood that these phrases meant that all *access roads* to the property in question would be completed within the required time period. Further, this interpretation is consistent with the testimony of plaintiff during the course of the trial.

Discussion and Conclusions of Law

In the present case plaintiff appears to assert that failure to construct roads which would be passable after four days of heavy rain constituted a material breach of the contract. However, the contract provides only that water bonded, graded rock roads would be constructed by the seller. The Court has found that water bonded, graded rock access roads were indeed constructed before the specified three-year limit. Therefore, defendant is not in breach of its contract.

In addition, plaintiff contends that the failure to complete construction of all roads within the four subdivisions within the three-year period constitutes a material breach of contract justifying rescission.

While Michigan courts have permitted rescission for breach of contract, not all failure to comply with the terms of a contract entitle the other party to abandon the agreement. The general rule is stated in *Rosenthal* v. *Triangle Development Co.*, 261 Mich. 462, 463 (1933)

> Rather rescission is permissible when there is failure to perform a substantial part of the contract or one of its essential items of where 'the contract would not have been made if default in that particular had been expected or contemplated.' 1 Black on Rescission and Cancellation (2nd ed.) p. 553.

See also, Restatement, Contracts §293 (1933); *Restatement 2d, Contracts* §§262, 264, 266 (tentative draft, 1973).

As stated earlier, this Court rejects plaintiff's interpretation of the contract, and finds that defendant did not breach its contract with plaintiff.

However, even assuming that the proper interpretation of the contract is the one given by plaintiff, this Court finds that the failure to finish construction of all the roads within the Columbus Landings Subdivisions II, III, and IV does not constitute a material breach of the contract terms.

In determining whether a breach is material, justifying rescission, the Michigan courts have accepted the criteria set out in *Restatement, Contracts* (1933).

Walker & Co. v. *Harrison*, 347 Mich. 630, 635 (1957). Section 275 of *Restatement* states

> In determining the materiality of a failure fully to perform a promise the following circumstances are influential:
>
> (a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;
>
> (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;
>
> (c) The extent to which the party failing to perform has already partly performed or made preparations for performance;
>
> (d) The greater or less hardship on the party failing to perform in terminating the contract;
>
> (e) The willful, negligent or innocent behavior of the party failing to perform;
>
> (f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract.

In the present case, plaintiff has received a hotel site bordering the ocean, with completed access roads as marked on the plat within the specified time limit. Several additional improvements have been made in the area by Columbus Landings Ltd., which increases the value of the land as a hotel site. The testimony established that the only hotel which is presently on the

island is completely booked with tourists through September of this year, and is substantially booked after that. A marina with scuba diving equipment is nearby, and is beginning to draw tourists.

Plaintiff purchased the property for investment purposes. At no time has he notified defendant that he wished to build on the property which he selected. It does not appear that he has any such plans in the foreseeable future. Plaintiff has introduced no evidence that the value of the property has diminished since its purchase in 1969. Nor was there any testimony to the effect that plaintiff would no longer be able to obtain substantial benefit, which he could have reasonably anticipated from the contract, because of the failure. On the other hand, most of the roads in question have already been completed, and are also being black-topped by defendant.

Therefore, the Court also finds that even should the contract be interpreted as plaintiff contends, defendant has substantially performed the contract, and any failure to complete construction of residential roads within the time limit constitutes only a technical breach of the contract. In such a case, plaintiff must resort to an action at law for damages.*

---

* Even had such relief been requested in this Court, this Court could not properly make such an award since plaintiff has not introduced any evidence of damages. However, such an award would have to be based upon an interpretation of the contract which this Court has previously rejected.

Plaintiff further alleges that the Court should order rescission of the contract because of fraudulent representations made by defendant. In *Head* v. *Benjamin Rich Realty Co.*, 55 Mich. App. 348, 358 (1974), the court stated

> The question in this case is whether or not the plaintiffs were induced to purchase the property by reason of defendants' fraudulent representations. Plaintiffs had the burden of proof to establish the essential elements of their cause of action. Farida v. Zahar, 50 Mich. App. 137, 142; 212 N.W.2d 739 (1973), quoting from Papin v. Demski, 17 Mich App. 151, 154-155, 169 N.W.2d 351, 353 (1969), said:
>
> > 'The general rule is that to constitute actionable fraud it must appear: (1) that defendant made a material misrepresentation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance on it; and (6) that he thereby suffered injury.'

In the present case, plaintiff alleges that the statement in the purchase agreement discussed earlier was made without any intention to perform, and that since he relied upon the statement, it constitutes fraud. As the

Court has stated earlier, defendant did in fact construct a water bonded, graded rock road adjoining plaintiff's property and giving access to the property from the other areas of the island within the time specified in the contract. The Court has also found that this was the interpretation given to the contract by both parties. Therefore, the representation was not false. This Court has further found that even should the representation be literally interpreted, it was not material to the contract. Therefore, the representations in the contract did not constitute fraud, and as such cannot constitute a basis for rescission.

Plaintiff also asserts that certain statements made by a salesman, an employee of the defendant, were fraudulent. Plaintiff testified that the salesman stated that the island would be a gold mine, and that plaintiff would be able to make a profit within a year or two. He also testified to similar statements being made at the time of the purchase. It is well established that such statements constitute mere puffing on the part of a seller. As the Michigan court stated in *Hayes Construction Co.* v. *Silverthorn*, 343 Mich. 421, 426 (1955), *quoting from* Judge Learned Hand,

> 'There are some kinds of talk which no sensible man takes seriously, and if he does, he suffers from his credulity. If we were all scrupulously honest it would not be so; but, as it is, neither party usually believes what the seller says about his own opinions, and each knows it. Such statements, like the claims of campaign managers before election, are rather designed to allay the suspicion which would attend their absence than to be understood as having any relation to objective truth.'

Representations as to the value of a property are generally regarded as mere expressions of opinion. *People* v. *Jacobs*, 35 Mich. 36 (1876); *Buxton* v. *Jones*, 120 Mich. 522 (1899); *Sutton* v. *Benjamin*, 231 Mich. 153, 155 (1925). This is especially true where a plaintiff has had the opportunity to, and actually does, inspect the property before purchase. *Sutton, supra*, at 155. In the present case, the Court finds that the statements of defendant's agent were no more than mere expressions of opinion by a vendee, and do not constitute fraud. Therefore, no action for rescission lies based upon these statements.

In summary, plaintiff is not entitled to rescission of the contract either on the ground of material breach of an essential term of the contract or on the basis of fraudulent misrepresentation, and this Court shall therefore enter a Judgment for No Cause of Action and its Order Granting Attorney Fees to Defendant.

/s/ Fred W. Kaess
United States District Judge

Dated: May 17, 1977.
Detroit, Michigan

Supreme Court, U. S.
FILED
SEP 21 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-293

JERRY YONO,
Petitioner,
v.
COLUMBUS LANDINGS, LTD.,
Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I

WAS THE DISTRICT COURT'S OPINION BASED ON SUPPORTED FINDINGS OF FACT, CONCLUSIONS OF MICHIGAN LAW, AND ARE THERE NO "SPECIAL OR IMPORTANT REASONS" WHY THIS HONORABLE COURT SHOULD REVIEW THE MATTER FURTHER?

II

DID THE DISTRICT COURT CORRECTLY DETERMINE IN LIGHT OF THE OPERANT AND EXISTENT FACTS THAT THE TERM "ALL ROADS" WAS AMBIGUOUS AND IN NEED OF JUDICIAL INTERPRETATION AND CONSTRUCTION?

III

ASSUMING ARGUENDO THAT "ALL ROADS" MEANT EVERY ROAD AND NOT JUST ACCESS ROADS, DID THE EVIDENCE ADDUCED AT TRIAL SUPPORT THE DISTRICT COURT'S DECISION THAT RESPONDENT SUBSTANTIALLY PERFORMED THE CONTRACT PROVISIONS REQUIRING COMPLETION OF SUCH ROADS WITHIN THREE YEARS?

IV

DID THE DISTRICT COURT ERR IN FINDING NO MATERIAL MISREPRESENTATION BY RESPONDENT WITH REGARD TO THE VALUE OF PROPERTY, DEVELOPMENT AND CONSTRUCTION OF ROADS ON THE ISLAND?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-293

JERRY YONO,
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v.
COLUMBUS LANDINGS, LTD.,
Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

COUNTER STATEMENT OF THE CASE

On or about May 25, 1970, Petitioner, Jerry Yono, entered into a contract for the purchase of land on the island of San Salvador, Bahamas, with Respondent, Columbus Landings, Ltd., a development corporation. Petitioner visited the island, saw all prepared plat maps (TR 50, 51) and received brochures describing the entire island prior to signing the purchase agreement.

Petitioner was approached in 1970 by John Wilt of Wilt International, the Michigan real estate broker for Columbus Landings Company, the sales arm of Columbus Landings, Ltd., a subsidiary of Investment Corporation of Florida (TR 68-70), who along with Sherwood Faubel, of Columbus Landings Company, negotiated the sale of Petitioner's property.

At the time of the purchase, in order to secure to himself the greatest investment protection, Petitioner agreed to purchase $100,000.00 worth of land in Columbus Landings I in order to establish himself in the priority system for a hotel site in a future subdivision, as yet undeveloped, since no hotel sites were then available. As further protection, Petitioner insisted on an addendum to the purchase agreement, which had specified in paragraph 8 that:

> The seller agrees to construct *water bonded, graded rock roads* throughout the Columbus Landings Subdivision shown on the plat and further guarantees that each lot covered by this agreement will have full frontage on such a road, accessible by automobile, before the expiration of the contract maturity period. (Emphasis added)

The addendum, drafted by Petitioner and agreed to by Respondent provided that:

> It is fully understood by the buyer that all roads must be completed with a maximum time limit of three (3) years.

On August 25, 1970, an amendment to the purchase agreement was executed changing Petitioner's property description to other land in Subdivision I (TR 32) and

again on July 8, 1971, changing Petitioner's property description to his specified hotel site in Subdivision III. (TR 33) Both changes were made with the full knowledge and consent of Petitioner.

Prior to cessation of payments, Petitioner traveled to the island on several occasions. (TR 50, 56, 57) Petitioner made timely payments of Sixty-Nine Thousand Two Hundred Fifty ($69,250.00) Dollars until July, 1974. (TR 61) Petitioner alleges he ceased payments due to Respondent's failure to complete "all roads" within the prescribed time period and because of a general lack of activity and development on the island. Petitioner cites an August 27, 1974 letter from Respondent referring to road construction contracts in Subdivision II, III, IV (TR 38, 39) as his justification for default.

At trial, Mrs. James Nall testified for Respondent that in 1970 a main access highway named Queen's Highway existed encircling the island. He further testified that by March of 1972 the main arterial highway to Subdivision III, Discovery Bay Blvd. was complete (TR 82), and that by March 31, 1972, substantially all the *graded rock roads* in Subdivision II, III, and IV were completed. (TR 83) He testified that these roads had to be completed prior to permission for land sales in New York State and that such permission was granted on March 31, 1972. (TR 83) He also testified that New York State was among those which inspected the property. (TR 80)

Contrary to Petitioner's contention, Mr. Nall testified that Columbus Landings itself had undertaken development including remodeling the Inn on the island in 1972-1973 (TR 89) and furthering its marina plans.

None of Respondent's testimony was controverted by Petitioner. Further, Petitioner failed at any time to introduce any evidence of injury to his investment. Development of the island continues at this time.

Petitioner brought suit in Federal District Court seeking rescission of his contract. On May 17, 1977, a bench trial was held before the Honorable Fred W. Kaess, District Judge, United States District Court, Eastern District of Michigan. After taking all testimony and reviewing all documentary evidence, pertinent sections of which have been cited, the Court entered a Judgment for Respondent, for No Cause of Action and granted Respondent attorney fees and costs. Petitioner appealed as of right to the Court of Appeals for the Sixth Circuit. On July 23, 1979, in a per curiam opinion, the Circuit Court of Appeals affirmed the District Court decision.

ARGUMENT

I

THE DISTRICT COURT'S OPINION WAS BASED ON THAT COURT'S FINDING OF FACT, CORRECT CONCLUSIONS OF MICHIGAN LAW, AND THERE ARE NO "SPECIAL OR IMPORTANT REASONS" WHY THIS HONORABLE COURT SHOULD REVIEW THE MATTER FURTHER.

Petitioner's request for Writ of Certiorari avoids showing how this cause meets the criteria necessary for review by this Honorable Court. While this case is properly cognizable by this Honorable Court under 28 U.S.C. 1254 (1), Respondent urges that Petitioner's request fails to meet the criteria as set forth in

28 U.S.C., Rule 19, which says in part:

> A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

However vigorously pursued, Petitioner's cause of action was and is, mundanely, one for rescission for alleged breach of contract.

At trial, the District Court Judge heard and weighed testimony, applied Michigan law correctly, and concluded from the facts as he heard them and the law, that Petitioner was not entitled to rescission. Upon review, the Court of Appeals agreed.

Petitioner has not set forth "special and important reasons" for review by this Court because there are none.

II

THE DISTRICT COURT CORRECTLY DETERMINED THAT IN LIGHT OF THE OPERANT AND EXISTENT FACTS THE TERM "ALL ROADS" WAS AMBIGUOUS AND REQUIRED JUDICIAL INTERPRETATION AND CONSTRUCTION.

The trial court was correct in its determination that in light of the operant and existing facts the term "all roads" was ambiguous and required judicial interpretation. The controversy at bar centers on the meaning of two contract provisions.

Paragraph eight was an integral part of the standard pre-printed contract and provided in pertinent part:

> "The Seller agrees to construct water bonded, graded rock roads throughout the Columbus Landings Subdivision shown on the plat and further guarantees that each lot covered by this Agreement will have full frontage on such a road, accessible by automobile, before the expiration of the contract maturity period."

An addendum drafted by Petitioner's attorney was added at Petitioner's request which provided in pertinent part:

> "1. It is fully understood by the buyer that all roads must be completed within a maximum time limit of three (3) years."

On its face the term "all roads" appears clear; however, the trial court correctly applied Michigan law and held it ambiguous, necessitating judicial interpretation because of the facts and circumstances surrounding its usage as elicited at trial.

It is uncontroverted that the initial contract and addendum were executed with the mutual understanding that Petitioner intended to exchange the original lots selected for a hotel site. He purchased the original lots solely to gain a priority in the selection of a hotel site when projected hotel sites were platted and available for purchase.

Clearly he was aware that the other subdivisions were still incomplete and being planned. In fact, two exchanges of property were effected and more than thirteen months passed before he actually received a hotel site.

Generally, unambiguous language must be held to express the parties' intent *Ginsberg v Reliable Linen Service*, 292 Mich 70, 290 NW 331 (1940); however, a contract must also be construed to effectuate the intent of the parties when it was made.

> "In deciding a case involving a contract dispute, the *primary* role of the court is to ascertain the *intent* of the parties." (Emphasis supplied) *Henry v J. B. Publishing Co.*, 54 Mich App 409, 411, 221 NW 2d 174, 175 (1974).

To ascertain the intent of the parties, a contract should be construed in accordance with the circumstances existing at the time it was made. *Pekar v Local Union No. 181, International Union of United Brewery, etc.*, WKRS, 311 F 2d 618 (C.A. 6. 1962). *Sobczak v Kotwicki*, 347 Mich 242, 79 NW 2d 471 (1958). *Switzer v Pinconning Mfg. Co.*, 59 Mich 488, 26 NW 762 (1886).

The trial court in its decision considered the testimony as to the circumstances existing at the time the contract at issue was made. At that time, the only roads platted were in Columbus Landings No. 1. (TR 67) Columbus Landings No. 1 was part of a then planned four-subdivision development, which totaled over 2,000 acres. The purchase agreement used was a standard form. The court properly considered these circumstances in determining the meaning of the contract provisions in accordance with the applicable law. *Pekar, et al., supra*.

Furthermore, the court found it:

> . . . highly unlikely that a developer, at that time selling property only in a single subdivision, would intend to agree that the other three subdivisions still in the planning stage would

> have *all* roads completed within a three-year period. (Petitioner's Supplemental Appendix Page 5)

Clearly the trial court had good reason to rule that "all roads" required interpretation.

The addendum was added because Petitioner wanted to insure that *access* to his property would be available prior to the time specified in paragraph eight. (TR 24) By March 31, 1972, less than two years after the original contract was signed, not only the main access highway encircling the island was complete, but also all roads in Subdivision I (TR 92), and the main arterial highway to Subdivision II and substantially all the *graded rock roads* in Subdivisions II, III and IV were completed. (TR 82-86 + 100)

Furthermore, it was the uncontroverted testimony of James Nall that the plats are constantly undergoing change, that a subdivision is a living, breathing thing, "you design it today and it changes tomorrow morning." (TR 110) In regard to Columbus Landings III he also testified:

> Columbus Landings Three is like any other subdivision. It's a growing, expanding piece of real estate, and I have just added a new section to it here, and road work is going on there right now, sections that are not shown on this plat, and there were roads shown on this one that were not shown on the one that Mr. Yono saw in 1971. (TR 109)

Under these circumstances it would be unreasonable and even impossible for Respondent to agree to construct *all roads* as is Respondent's contention. Clearly Petitioner, as a sophisticated buyer knew this.

In view of these facts and circumstances, the trial court had good reason to rule that:

> . . . both parties understood that these phrases meant that all access roads to the property in question would be completed within the required time period. Further, this interpretation is consistent with the testimony of plaintiff during the course of the trial.

The trial court's decision and interpretation was proper in accordance with operant fact and applicable law and should not be disturbed.

III

ASSUMING ARGUENDO THAT "ALL ROADS" MEANT EVERY ROAD AND NOT JUST ACCESS ROADS, THE EVIDENCE ADDUCED AT TRIAL SUPPORTS THE DISTRICT COURT'S DECISION THAT RESPONDENT SUBSTANTIALLY PERFORMED THE CONTRACT PROVISIONS REQUIRING COMPLETION OF SUCH ROADS WITHIN THREE YEARS.

The trial court's determination that even if the term "all roads" was construed to mean every road, that Respondent had substantially complied with the contract requirements is supported by the evidence and applicable Michigan law.

The standard adopted and applied by the trial court was enunciated by the Michigan Supreme Court in *Walker & Co. v Harrison*, 347 Mich 630 (1957) adopting Section 275 of the *Restatement of Contracts* (1933):

"In determining the materiality of a failure fully to perform a promise the following circumstances are influential:

(a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;

(b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;

(c) The extent to which the party failing to perform has already partly performed or made preparations for performance;

(d) The greater or less hardship on the party failing to perform in terminating the contract;

(e) The wilful, negligent or innocent behavior of the party failing to perform;

(f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract."

To date, *Walker, supra,* has not been overruled, nor have Michigan courts adopted the tentative draft of *Restatements 2d, Contracts*.

There was uncontroverted testimony that by March 31, 1972, less than two years after the original contract was signed, not only the main access highway encircling the island was complete, but also all roads in Subdivision I were completed by September, 1971 (TR 92), the main arterial highway to Subdivision III and substantially all the *graded rock roads* in Subdivision II, III and IV were completed. (TR 82, 86, 100) Furthermore, the black topping required, but not

essential for use of roads had been completed in several areas by 1976. (TR 101)

This evidence and testimony clearly and unequivocally refutes Petitioner's bald assertions and representations that "neither the promised road construction or island development have *yet* occurred." (Petitioner's Petition Page 15) Conversely, many roads had been constructed well before the expiration of three years.

Furthermore, as previously discussed the development of the property was continually undergoing revision and still is. Mr. Nall's testimony as previously set forth indicates that until all the property is sold changes continually will have to be made in minor roads. (TR 109, 102) Under these circumstances Petitioner received the substantial benefit which he reasonably anticipated.

Even assuming the roads were not substantially completed the trial court's decision is correct because the record is void of any testimony establishing the elements required to demonstrate a material breach under any test.

There is no testimony demonstrating damage to Petitioner. The only witnesses examined were Petitioner and Respondent's President. Petitioner was not qualified as an expert in land appraisal and even if he had been did not testify concerning how he had been damaged, the extent of the damage or the value of the non-existent damage. In fact, Petitioner failed to present any competent evidence on any point set forth in either Restatement.

Petitioner has erroneously relied on *Brown v Gibratar Land Co.*, 249 Mich 662, 229 NW 604 (1930) on appeal both to the Sixth Circuit Court of Appeals and in his Petition before this Honorable Court. The only similarities in the two cases are that they both involved the sale of land and agreements to construct improvements subsequent to the sale. The distinction is that *Brown* involved a substantial breach amounting to fraud. Clearly the record in the case at bar is void of even a scintilla of fraud.

Respondent has a large investment in its San Salvador development. The evidence is uncontroverted that development continued unabated from 1970 to 1977, notwithstanding a sales depression in 1974. In fact, in 1974, prior to Petitioner's rejection of the contract, Respondent borrowed additional funds to continue developments and improvements. (TR 106, 107)

Accordingly, Respondent contends that even if the trial court erred in determining that "all roads" meant access roads thereby requiring Respondent to complete all roads, Respondent has substantially complied with its commitments. Respondent therefore contends that the trial court correctly ruled that even if the contract required Respondent to construct every road, substantial compliance had been achieved.

Furthermore, an examination of the transcript and exhibits convincingly demonstrates that the trial court accurately recalled Petitioner's evidence in his opinion:

> At no time has he notified defendant that he wished to build on the property which he selected. It does not appear that he has any such plans in the foreseeable future. Plaintiff has introduced no evidence that the value of the property has diminished since its purchase in 1969. Nor was there any testimony to the effect that plaintiff would no longer be able to obtain substantial benefit, which he could have reasonably anticipated from the contract, because of the failure.

In view of the affirmative testimony produced by the Respondent and Petitioner's failure to even specifically meet the elements for finding a material breach of contract, Respondent urges that the decisions of the trial and appellate courts be affirmed.

IV

THE DISTRICT COURT DID NOT ERR IN FINDING NO MATERIAL MISREPRESENTATION BY RESPONDENT WITH REGARD TO THE VALUE OF PROPERTY, DEVELOPMENT, AND CONSTRUCTION OF ROADS ON THE ISLAND.

To prove reversible error, Petitioner must show the District Court's judgment to be clearly erroneous by virtue of (a) insufficient evidence upon which to reach its conclusions or (b) failure to correctly apply Michigan law to the facts as presented at trial. Respondent contends Petitioner has shown neither.

During trial, extensive testimony was taken of both plaintiff and defendant in plaintiff's attempt to prove fraudulent misrepresentation. Plaintiff testified that defendant's agents told him the island in question would be "a gold mine within a year or two" and that he would be able to sell his property for "a heck of a lot more" than he paid. (TR 8, 15, 23) He also testified,

however, that he had engaged in business for over 20 years and that during the course of that business he had bought and sold real estate (grocery stores) on several occasions. (TR 5, 6) Plaintiff also testified he was told negotiations *were proceeding* with "a couple of hotel chains" and he felt "that if the chains were going there, that there wouldn't be any problem for me to go in there and put up the hotel." (TR 47) He never was told that a contract had been reached with any hotel chain and he did not so testify. Plaintiff also testified that he made several trips to the island, including one prior to any land purchase and one at least one and one-half years prior to his cessation of payments. (TR 51, 56, 61) At all times there was a road around the island, although plaintiff on one occasion reached his property (bounded on two sides by the ocean at his own specification) by boat. (TR 56)

The lack of support for plaintiff's contentions of misrepresentation were clearly demonstrated by defendant's testimony. James Nall, president of Investment Corporation of Florida, the effective owner of Columbus Landings, Ltd., testified on behalf of defendant. Defendant's testimony regarding construction of "all roads", and principally all roads in Sub. #3 where plaintiff's property was located, clearly exposed the lack of basis for plaintiff's complaint. According to defendant, the main arterial road in Sub. #3, Discovery Bay Blvd. as distinguished from the Queen's Highway surrounding the island, was completed in early 1972. All other roads in Sub. #3 which appeared on the plat as plaintiff saw it were substantially completed at the same time. Defendant was able to pinpoint the time factor since sales in New York State could not begin until completion of those

roads, and sales began in New York in 1972. Therefore, Petitioner's condition was effectively and substantially met prior to the expiration of the term called for by the contract addendum. (TR 82, 88) Judge Keith in his dissenting opinion in the Circuit Court of Appeals said that the condition had not been met because the only road constructed was the single access road around the island. After examination of the transcript, it is apparent that Judge Keith misread the uncontroverted testimony of defendant and failed to distinguish between the Queen's Highway and Discovery Bay Blvd.

As for Petitioner's claim that Respondent's agents misrepresented the island as a potential "gold mine," the trial judge was clearly within the realm of reason in determining these remarks to be "puffing." The statements made were done so by salesmen, a fact known to Petitioner. It is a salesman's job to sell his product, in this case, land. The idea that a salesman's estimate of *potential* value of property could seriously be taken as fact rather than opinion by this relatively sophisticated buyer is patently absurd. *Hayes Construction Company v Silverthorn*, 343 Mich 421, 426, 72 NW 2d 190 (1955) adopts the following concept from Judge Learned Hand:

> There are some kinds of talk which no sensible man takes seriously, and if he does, he suffers from his own credulity.

Michigan law has clearly established the criteria for fraudulent misrepresentation. As recited in *Papin v Demski*, 17 Mich App 151, 154, 155, 169 NW2d 351, 353 (1969),

> The general rule is that to constitute actionable fraud it must appear: (1) that defendant made a

material misrepresentation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance on it; and (6) that he thereby suffered injury.

Head v Benj. Rich Realty Company, 55 Mich App 348, 222 NW 2d 237 (1974), established that when a cause is based on alleged fraudulent misrepresentation inducing purchase, "plaintiff had the burden of proof to establish the essential elements of their cause of action." In the instant cause, Petitioner never established *any* of the recognized essential elements as required by Michigan law.

Uncontroverted testimony referred to earlier demonstrates that no misrepresentation was made — the roads were completed — (TR 82); the intention of Respondent was then and has been since to develop the island (TR 89, 92); Petitioner did not rely on statements made by Respondent (TR 114); and no testimony was ever introduced to show *any* damage to Petitioner, in fact, uncontroverted testimony clearly shows values have appreciated on the island. (TR 110)

Mention must be made of Petitioner's reliance on *Kefuss v Whitely*, 220 Mich 67, 189 NW 76 (1922) as an indication that statements of value can be relied on as fact. Petitioner has failed to understand that the result reached in *Kefuss, supra*, was due to bad faith on the part of defendant, and that no such bad faith exists in this case.

It is therefore clear from an examination of the transcript and of existing Michigan law that the trial judge accurately determined the facts as supported by the evidence, and accurately applied the law to them.

CONCLUSION

It is apparent that the trial judge made proper findings of fact and applied Michigan law correctly. There are no compelling or overriding reasons why this Court should grant Petitioner the relief requested. Respondent thus prays that this Honorable Court deny Petitioner a Writ of Certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,

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